MALACCA PRECAST CONCRETE WORKS v. WILLIAM JACKS & CO. (M) SDN. BHD.

[F.C. (Azmi L.P., Ali F.J. and Syed Othman J.) April 24, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X64 of 1969]

Practice and Procedure — Judgment on admissions — Allegation that proper party had not been sued — R.S.C. 1957, O. 32 r. 6.

The respondents had brought an action against the appellants for the sum of $35,241.78 for goods sold and delivered. The writ was served on one Ong who accepted service. Ong later applied to have the service of the writ set aside but his application was dismissed. In the meantime a sum of $10,000 had been sent by solicitors purporting to act on behalf of the appellants towards the debt. The respondents thereupon applied for summary judgment under O. 14 but this application was refused. The appellants did not file any defence. The respondents thereupon made an application for judgment under R.S.C., 1957 O. 32, r. 6. This application was granted and the appellants thereupon appealed.

Held, dismissing the appeal: (1) it appeared that it was reasonable to assume that the business of the old firm, a sole proprietorship whose sole proprietor had died, was being carried on by the new firm as a partnership and as the goods had been duly delivered substantial justice had been done although technically the wrong party had been sued;

(2) the letter from the solicitors amounted to an admission of liability and the learned trial judge was right in giving judgment on such admission.

FEDERAL COURT.

Kok Wee Kiat for the appellants.

F. H. de Cruz for the respondents.

Cur. Adv. Vult.

Ali F.J.: This is an appeal from the decision of Sharma J. in the High Court, Malacca, granting the respondents, William Jacks & Co. (Malaysia) Sdn. Bhd., leave to sign final judgment for the sum of $35,241.78 and costs. The respondents' application was made under Order 32 rule 6 of the Rules of the Supreme Court 1957, which provides:

"6. Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just."

The admission relied upon is contained in a letter dated 12th July, 1968 from Mr. J. K. Tan, advocate and solicitor, enclosing a cheque for $10,000 "towards the debt owed by my clients." The full terms of this letter are as follows:

"J.K. Tan
Advocate & Solicitor,
117, Jalan Hang Jebat.
Malacca.

Our Ref: TJK/L/13/68/J.
12th July, 1968.

Your Ref: TA/RB/CL/172/67.

Ms. Tay Leong Siak & Co.,
Malacca.

Dear Sirs,

Re: Malacca High Court C.S. No. 204 of 1967.
William Jacks & Co. (M) Sdn. Bhd.
vs.
Malacca Precast Concrete Works.

With reference to your letter of 12th July, 1968 I enclose herewith my cheque for $10,000/- towards the debt owed by my clients.

Would you, please acknowledge receipt.

Yours faithfully,
Sd. J.K. Tan."

As may be noticed the date of the letter, the reference to parties in Malacca Civil Suit No. 204 of 1967 (the action in this appeal) and the name of the solicitors, Messrs. Tay Leong Siak & Co., to whom the letter was addressed, provide sufficient grounds for the conclusion that at the time while the action was pending Mr. J. K. Tan was acting for and on behalf of the defendants sued in the action. As to its contents, the payment of the $10,000 was at least a clear admission of the part of the debt sued for. Whether or not it also amounts to an admission of the whole amount claimed by the plaintiffs was, of course, a matter to be implied from all the circumstances of this case. Up to now there is absolutely no indication whatsoever on record to show the defence answer to the claim which is over a liquidated sum of money being the price of goods supplied and delivered. In other words, no substantive defence was disclosed or suggested. Up to the time when the application came before Sharma J. the suggested defence was a technical defence that the defendant firm, Malacca Precast Concrete Works, could not be legally sued. Before coming to the real substance of this appeal, I shall deal shortly with the proceedings that have taken place before the application in this appeal came up for hearing before Sharma J.

By a writ specially indorsed with a claim for $45,241.78, the plaintiff sued the defendant firm. The writ issued on the 23rd November, 1967 was served on Mr. Ong See Keng as the person appearing to have the control or management of the defendant firm's business. The statement of accounts was in the defendant firm's name and the goods were alleged to have been supplied for the period between June and October, 1967. It was part of the plaintiffs' case, therefore, that during the period as stated the defendant firm was in existence. The service of the writ on Mr. Ong See Keng was under Order 48A rule 3 and the notice under rule 4 to him made it abundantly clear that he was sued as the person appearing to have the control or management of the defendant firm's business. If the defendant firm was non-existent, Mr. Ong See Keng could very well have refused to accept service. But Mr. Ong See Keng accepted service and objected to it as being irregular on the unfounded ground, as stated in his memorandum of appearance, that he was being served as a partner. I say unfounded because he was never served as a partner. Subsequently he applied by summons in chambers dated 26th February, 1968 to have the service of the writ set aside. In his supporting affidavit sworn on the 24th February, 1968, he maintained that he was not a partner and in paragraph 4 thereof he contended that if he was served as a servant of the partner of the firm, the service of the writ was bad because he was not a servant of the partner but as a receiver and manager appointed by the court he was a servant of the court. In a subsequent affidavit sworn on the 18th

March, 1968, Mr. Ong See Keng elaborated further by saying that the defendant firm never bought any goods from the plaintiffs. In paragraph 8 of that affidavit, it was disclosed that the defendant firm had ceased to exist as on 31st May, 1965. Thereupon, it was suggested that the particulars of the plaintiffs' claim merely disclose a case against the new firm, Malacca Precast Concrete Works (1965). If the facts as disclosed in Mr. Ong See Keng's second affidavit are true, it seems fairly clear that the plaintiffs have made a genuine mistake by suing a non-existent firm. Such a genuine mistake could easily have been rectified by a formal amendment to substitute Malacca Precast Concrete Works (1965) as the defendant in the action. This, however, did not come about for Mr. Ong See Keng's application to set aside the service of the writ was dismissed by Ibrahim J. on 20th February, 1969. Inasmuch as there was no appeal against the dismissal, it is impossible to know the reason for it.

In the meantime, the plaintiffs have also filed summons in chambers dated 5th March, 1968, applying for summary judgment under Order 14. This came up for hearing before Syed Agil Barakbah J. on 9th April, 1969 by which date Mr. Ong See Keng's application to set aside the service of the writ had already been disposed off. Even if in the affidavit supporting the application for summary judgment, the plaintiffs have not stated correctly the law relating to appearance, this was of no consequence for at the hearing before Syed Agil Barakbah J. as reflected in the notes of arguments in the record, the arguments seemed to have proceeded along the line that what was originally a conditional appearance has become unconditional upon the dismissal of Mr. Ong See Keng's application by Ibrahim J. On that basis it was argued that an order for summary judgment could properly be applied for against the defendant firm. At the same time it was also disclosed that the sum of $10,000 had been paid towards the amount claimed. This amount was referred to in the letter dated 12th July, 1968 from Mr. J. K. Tan. On behalf of the defendant firm Mr. Kok Wee Kiat, who took over from Mr. J. K. Tan, has contended that the defendant firm could not legally be sued as it was a sole proprietorship and that the sole proprietor, Mr. Goh Joon Hoe, had died before the commencement of the action. The apparent ground for the contention was that the defendant firm had ceased to exist on the death of Mr. Goh Joon Hoe. If this was the true legal position, the plaintiffs' in the action have, therefore, proceeded against the wrong party. After hearing arguments Syed Agil Barakbah J. dismissed the plaintiffs' application for summary judgment. Against this there was no appeal. The legal position then was that it was open to the defendant firm to defend the action. In the absence of any express directions by Syed Agil Barakbah J. to the contrary, defence would have to be filed within 8 days. See Order 21 rule 7 of the Rules of the Supreme Court. In this case the last date for filing a defence was 17th April, 1969. But on the 16th April, 1969, the plaintiffs again filed a summons in chambers applying for leave to enter final judgment. This time the application was made under Order 32 rule 6, the terms of which have already been set out. Whether or not this rule applied in view of what have happened previously was not argued but it seems implicit in the judgment of Sharma J. who heard the application on the 2nd May, 1969 that it did apply. Mr. Kok Wee Kiat who again appeared at the hearing repeated the argument that the defendant firm could not legally be sued. In any event counsel contended that the letter from Mr. J. K. Tan was not an admission of liability. On the question whether or not the defendant firm could legally be sued, Sharma J. found on the evidence that the goods in respect of which the claim was made had been ordered in the name of the defendant firm as though the firm was still in existence. The learned trial judge was satisfied that the representation that it was still in existence was made by none other than the person or persons who are now objecting to the defendant firm being sued. On the other question whether or not Mr. J. K. Tan's letter was an admission of liability to pay the whole amount claimed in the action, Sharma J. had no doubt that it was. These are the two questions for our consideration in this appeal.

On the first question, it seems clear on the facts that the defendant firm was a sole proprietorship and the sole proprietor Mr. Goh Joon Hoe had died before the action in this appeal was instituted. Mr. Ong See Keng and three others were by order of the court dated 23rd December, 1964 appointed receivers and managers of the business of the firm as there were existing contracts with the Government to complete. It is also clear on the facts that the new firm, Malacca Precast Concrete Works (1965) which was registered as a business on the 27th December, 1967 had commenced business on the 1st June, 1965 at No. 20, Jalan Munshi Abdullah, Malacca, which was also the address of the defendant firm. The goods in respect of which the claim was made were ordered on the printed letter head of the defendant firm whose seal or chop appeared on the delivery orders. Since these goods were supplied and delivered in 1967, it can only be a matter of speculation whether they were received by person or persons as receivers and managers of the business of the old firm or as partners of the new firm, Malacca Precast Concrete Works (1965). Mr. Ong See Keng in his application to set aside the service of the writ had assumed that the plaintiffs' claim was against the new firm and that the writ was served on him as partner of that firm. In paragraph 7 of his further affidavit sworn on the 18th March, 1968, he said so in clear terms. It is true in paragraph 4 of his earlier affidavit sworn on the 24th February, 1968, there was some suggestion that he was being served as a receiver and manager but neither in this affidavit nor in the subsequent affidavit of the 18th March, 1968 was it disclosed for the purpose of which business the goods were ordered. In point of fact there was not the slightest suggestion that the goods had not been delivered. The letter from Mr. J. K. Tan was a clear admission of a liability to pay for the price of the goods so delivered. It was an admission of liability by Mr. Ong See Keng and three other persons either in their capacities as receivers and managers of the estate of Mr. Goh Joon Hoe or as partners of the new

firm. If it was an admission by the receivers and managers of the business of the old firm, then they have no cause to complain against the order granting the plaintiffs leave to enter judgment for the balance of the amount claimed. Nor would they have any cause to complain if the admission of liability was by them as partners of the new firm. As the name of the new firm would appear to indicate, it seems reasonable to assume that the business of the old firm, which ceased to exist, was being carried on by the new firm as a partnership. Substantially justice has been done and it was pointless to argue that the proper party has not been sued. On record the old firm is still named as the appellant in this appeal. If it was thought necessary to object to it being sued as the defendants in the action, there was nothing to prevent a technical defence being raised after summary judgment was refused by Syed Agil Barakbah J. But no defence whatsoever was filed and in the usual way the plaintiffs would have been entitled to obtain judgment under Order 27 rule 2 of the Rules of the Supreme Court. It is not necessary to speculate as to what would have happened if a defence had been filed. On the remaining question whether the letter from Mr. J. K. Tan amounts to an admission of liability to pay the sum claimed by the plaintiffs, I have no doubt that Sharma J. was right in his conclusion that it was such an admission. The implication of the letter is so clear that no other conclusion is possible.

Accordingly, I would dismiss the appeal with costs here and below.

Azmi L.P. and **Syed Othman J.** concurred.

Appeal dismissed.

Solicitors: *Mah & Kok; Tay Leong Siak.*

LIM MOH JOO v. PUBLIC PROSECUTOR

[A.Cr.J. (Wan Suleiman J.) May 16, 1970]
[Alor Star — Criminal Appeal No. 69 of 1968]

Criminal Law and Procedure — Medical report of alleged assault — Report given in evidence without calling the maker thereof — Copy of report to be given to accused not less than 10 clear days before trial — Whether provision applicable in case of a prosecution by private person — Interpretation of statute — Criminal Procedure Code (Cap. 6), ss. 380 and 399(i).

Interpretation — Statute — Intention of legislature — Where court has to modify language of law to meet intention of legislature.

The appellant had been charged and tried on a private summons for having used criminal force upon the complainant. In the course of her evidence the complainant produced two medical certificates from a medical officer but that officer was not called to give evidence. No copy of the report had been supplied to the appellant.

Held, allowing the appeal: the provisions of section 399(i) of the Criminal Procedure Code (Cap. 6) which require the Public Prosecutor to deliver a copy of the report to the accused not less than 10 clear days before the commencement of the trial should be applied where the prosecution is by a private person and in this case as such provision was not complied with, the reports were inadmissible in evidence and therefore the order binding over the appellant must be quashed.

Cases referred to:-

(1) *Wong Kok Keong* v. *R.* [1954] M.L.J. xxxix.

(2) *Seaford Court Estates Ltd.* v. *Asher* [1949] 2 All E.R. 155.

MAGISTRATE'S CRIMINAL APPEAL.

Albert S. C. Hoe for the appellant.

Tunku Mukhtar bin Tunku Yaacob (Deputy Public Prosecutor) for the respondent.

Wan Suleiman J.: The appellant was charged and tried in the magistrate's court on a private summons taken out by the complainant, for having used criminal force upon the latter, an offence punishable under section 352 of the Penal Code.

In the course of her testimony the complainant produced two medical certificates, from the same medical officer. There is some doubt as to whether the learned magistrate had considered the one issued on the day of the alleged assault, or the one issued the following day, the latter adding one more injury to that mentioned in the first report. From the grounds of judgment, however, it would seem that the latter certificate was the one taken into account, though failure to include a copy thereof in the appeal file in which only a copy of the earlier certificate had been included, had given rise to criticism of his grounds of judgment by learned counsel for the appellant.

No witness was called by the complainant.

The appellant's defence was a denial that there had been any assault on the complainant since he was not in the vicinity of the building in which both lived at the time of the alleged assault. He called a witness who testified to the same effect.

The learned magistrate found the appellant guilty and bound him over, and in addition ordered him to pay $45 as compensation to the complainant.

Now there is nothing on record to indicate that the appellant had been served with a copy of the medical report, and it was urged on his behalf that section 399 (i) (b) of the Criminal Procedure Code (Cap. 6) applies not only to the Public Prosecutor, but also to a case of this sort where there is a prosecution on a private summons by a private person.

The relevant portion of section 399(i) reads as follows: —

"Any document purporting to be a report under the hand of any of the persons mentioned in sub-section (ii) of this section upon any person ... examined ... by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person ... shall be required to attend as a witness —

(a) by the court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial."